

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GILDA M. COKER
Plaintiff

vs.

Christine Todd Whitman, Adm., EPA
Defendants

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02-cv-3735

O R D E R

AND NOW, this day of September, 2002, upon review of Defendants's Motion for Leave to File its Reponse Out of Time pursuant to F.R.Civ.P. 6(b)(2), there being excusable neglect and Plaintiff not having been prejudiced thereby, it is hereby ORDERED that Defendants's Motion is GRANTED.

BY THE COURT:

HARVEY BARTLE, III
Judge, United States District Court

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MOTION FOR LEAVE TO FILE RESPONSE OUT OF TIME

AND NOW, come Defendants by and through their counsel, Patrick L. Meehan, United States Attorney for the Eastern District of Pennsylvania, and Linda Shafer Bocchnino, Assistant United States Attorney, of the same district, and hereby respectfully request that this Honorable Court permit them to file their response to the within Complaint alleging discrimination out of time, for the reasons that

(1) Defendants's delay in filing a response was due to the U.S. Attorney's Office having no record of service of the within complaint, and (2) Plaintiff has not been prejudiced by the delay, as more fully explained in the memorandum of law attached hereto

Respectfully submitted,

PATRICK L. MEEHAN
United States Attorney

JAMES G. SHEEHAN
Chief, Civil Division

LINDA SHAFER BOCCHINO
Assistant United States Attorney

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'S
MOTION FOR LEAVE TO FILE RESPONSE OUT OF TIME

STATEMENT OF FACTS

The United States Attorney's Office (USAO) became aware of the within complaint, alleging discrimination on the part of certain employees of the Environmental Protection Agency (EPA), when the local EPA Office faxed a copy to the USAO on June 26, 2002. [Ex. 1]

The Complaint was processed by the USAO's docketing office and it was determined that the USAO had not been served and so noted. [Ex. 2] A case file was made up and the case was assigned to AUSA Linda Shafer Bocchino. [Ex. 3]

After verifying with the USAO's electronic docket that no service had been made, AUSA Bocchino wrote to plaintiff, advising her that service of the complaint had not been perfected upon the USAO. [Ex. 4] AUSA Bocchino received no response from plaintiff, either by phone or in writing.

Having waited an appropriate amount of time, and not having heard from plaintiff, AUSA Bocchino prepared to file a motion to dismiss for lack of service. In preparation thereof, AUSA Bocchino checked the USAO's Civil electronic docket and confirmed that service still had not been made. [Ex.5] Upon checking the U.S. District Court's electronic docket , AUSA Bocchino discovered the entry stating that the U.S. Attorney's Office had been served with a copy of the complaint, allegedly on June 13, 2002. (The entry is dated July 16, 2002) [Ex. 6]

The U.S. Attorney's Office has no record of having been served with the complaint in this matter. However, inasmuch as this is not a *Biven's* action against a federal employee in his or her individual capacity, the USAO has determined to countenance the service averment set forth in the U.S. District Court's electronic docket. As such, Defendants are out of time to file a response. Accordingly, Defendants respectfully move this Honorable Court for an extension of time in which to file a response to the within complaint, pursuant to F.R.Civ.P. 6(b)(2).

LEGAL ARGUMENT

Federal Rule of Civil Procedure 6(b) (2) permits a party to file a pleading upon motion after expiration of the specified period permitted, where there is excusable neglect. Given the unusual set for circumstances that led to the within delay, Defendants respectfully request that this Honorable Court permit them to file their response out of time. Significantly, Plaintiff has not been prejudiced by the delay.

ENTRY OF DEFAULT UNDER THE CIRCUMSTANCES
IS INAPPOSITE TO THE EQUITABLE GUIDELINES
ESTABLISHED BY THE THIRD CIRCUIT.

Entry of default would be inapposite to the equitable guidelines established by the Third Circuit. See e.g., Duncan v. Speach, 162 F.R.D. 43, 45 (EDPA 1995), Holloway v. Kemp, 1995 WL 71228 (EDPA 1995), Walsh v. Smithkline Beckman, et. al., 1990 WL 76460 (EDPA 1990), which stand for the proposition that even when a party may technically be in default, the Court may within its discretion not enter an order of default. Rather, the Court looks to balance the failure of the party to timely act against the prejudice imposed upon the petitioner. In fact, the Third Circuit has adopted a policy disfavoring default judgments and encouraging decisions on the merits. Harad v. Aetna Casualty and Surety Co., 839 F.2d 979,982 (3d Cir. 1988); United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984).

A DEFAULT MAY NOT BE TAKEN AGAINST
AN AGENCY OF THE UNITED STATES

Federal Rule of Civil Procedure 55(e) provides: "No judgment may be entered against the United States or an officer or an agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." See also: Fedor v. Ribicoff, 211 F.Supp. 520 (EDPA 1962). In short, plaintiff must put into evidence his case in chief. Plaintiff's complaint is devoid of legal support for her claim of deprivation of her Constitutional rights.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court's permission to file their response out of time and that they be granted thirty additional days to respond.

Respectfully submitted:

PATRICK L. MEEHAN
United States Attorney

JAMES G. SHEEHAN
Chief, Civil Division

LINDA SHAFER BOCCHINO
Assistant U.S. Attorney

September 13, 2002

CERTIFICATE OF SERVICE

I, Linda Shafer Bocchino, Assistant United States Attorney, hereby certifies that I causes a true and correct copy of the within Motion for Leave to File Response Out of Time, was served this day, by First Class mail, prepared, upon:

GILDA COKER
232 S. Melville Street
Philadelphia, PA 19139

By: _____
LINDA SHAFER BOCCHINO